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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services	CC Docket No. 98-11

Comments of the Information Technology Association of America

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SUMMARY

The Commission should deny Bell Atlantic's request for immediate deregulation of all broadband offerings. The Commission does not have the legal authority to grant Bell Atlantic's request. Doing so, moreover, would be inconsistent with the pro-competitive policies embodied in the Telecommunications Act, and would not promote deployment of advanced telecommunications services.

The Commission does not have the legal authority to forbear from applying Sections 251(c) and 271 of the Communications Act. Section 10(a) of the Act is the sole basis on which the Commission may exercise forbearance authority. Section 10(d) makes clear, however, that the Commission may not use this authority to forbear from applying the requirements of Section 251(c) or 271 until the agency determines that "those requirements have been fully implemented." Bell Atlantic cannot avoid this restriction by relying on Section 706 of the Telecommunications Act. This provision is not an independent grant of authority; it merely directs the Commission to use statutory powers granted elsewhere in the Communications Act to promote the deployment of advanced telecommunications services.

Nor can the Commission use Section 3(25)(B) of the Communications Act to eliminate the statutory prohibition on the provision of inter-LATA service by the BOCs. At most, Section 3(25)(B) empowers the Commission to make limited modifications to the LATA lines adopted in the Modification of Final Judgment. The Supreme Court has made clear, however, that the Commission's authority to "modify" a statutory requirement may not be used to "eliminate" the requirement. MCI v. AT&T, 512 U.S. 218, 229 (1994).

In addition, to the extent that a portion of the traffic that will be carried over Bell Atlantic's local facilities is jurisdictionally intrastate, Section 2(b) of the Communications Act

plainly restricts the ability of the Commission to fully deregulate the carrier's offering because doing so would require the agency to preempt valid State regulations. The Commission may only exercise preemptive authority if it can satisfy the "impossibility exception" carved out of Section 2(b) of the Communications Act by Louisiana PSC and its progeny.

The Commission also should reject Bell Atlantic's proposal because it is fundamentally inconsistent with the pro-competitive approach embodied in the Telecommunications Act. Grant of Bell Atlantic's request for immediate entry into a significant portion of the inter-LATA market would substantially reduce the carrier's incentives to open the local market to competition. At the same time, elimination of pricing and separation requirements would further enhance its ability to act anti-competitively.

Eliminating Bell Atlantic's regulatory obligations is not likely to facilitate the deployment of advanced telecommunications services. Contrary to Bell Atlantic's contention, the real problem for information services subscribers is not in the Internet backbone; it is in the local market -- which is dominated by monopoly carriers that provide most users with no practical alternative other than to access the Internet using POTS lines. Bell Atlantic's history of deploying advanced services in the local market is not an impressive one. The carrier was slow to make ISDN available, and has threatened not to deploy any advanced local telecommunications services unless information service providers are required to use them, rather than existing offerings.

Experience demonstrates that the only means to ensure the deployment of advanced telecommunications services is for the Commission to adopt policies that will promote competitive provision of these offerings. The Commission is currently considering precisely this

issue in the Internet Inquiry. As competition grows, ITAA believes that the Commission should fully implement the provisions of the Telecommunications Act designed to eliminate any regulations that have outlived their usefulness.

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The Information Technology Association of America ("ITAA") hereby opposes Bell Atlantic's petition requesting the Commission to immediately eliminate all regulations applicable to its provision of broadband telecommunications services.[1]

INTRODUCTION

In its petition, Bell Atlantic seeks authority to provide broadband telecommunications services on a non-regulated basis. In order to do so, Bell Atlantic asks the Commission to lift the current restrictions on Bell Operating Company ("BOC") provision of inter-LATA services, as well as all "pricing, unbundling, and separations" regulations applicable to any advanced telecommunication service that it may offer.[2] The carrier argues that this

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1 See "Commission Seeks Comment on Bell Atlantic Petition for Relief From Barriers to Deployment of Advanced Telecommunications Services," DA 98-184, CC Docket No. 98-11 (rel. Jan. 30, 1998).

2 Petition of Bell Atlantic at 3-4 (filed Jan. 26, 1998) ("Petition").

"relief" is necessary for two reasons. First, Bell Atlantic contends that lifting the inter-LATA restriction will allow it to deploy Internet backbone capacity. This, the carrier further asserts, is necessary to cure an alleged shortage of capacity on the Internet, which supposedly is resulting in sluggish transmission speeds. Second, Bell Atlantic claims that eliminating Title II regulation is necessary to provide it with adequate incentives to deploy local broadband facilities, which can provide high-speed access to the Internet.

ITAA supports efforts to promote the deployment of broadband infrastructure and services, which will enable business and consumers to enjoy rapid and affordable access to a wide array of information services that are available on the Internet and other on-line networks. ITAA further recognizes that the incumbent local exchange carriers can play an important role in deploying the necessary telecommunication infrastructure and services. The Association also supports appropriate efforts to eliminate unnecessary regulatory restrictions.

Notwithstanding the above, ITAA believes that the Commission must deny the Bell Atlantic proposal. The Commission does not have the legal authority to grant Bell Atlantic's request for immediate deregulation of all broadband offerings. Such an approach, moreover, would be inconsistent with the pro-competitive policies embodied in the Telecommunications Act, and would not promote deployment of advanced telecommunications services.

Rather than "flash-cut" deregulation of the incumbent monopoly provider, ITAA believes that the public interest is best served by Commission policies that promote competitive deployment of advanced telecommunications infrastructure and services. As competition grows, ITAA believes that the Commission should fully implement the provisions of the

Telecommunications Act designed to eliminate any regulations that have outlived their usefulness.

I. THE COMMISSION LACKS THE LEGAL AUTHORITY TO PROVIDE THE RELIEF REQUESTED BY BELL ATLANTIC

In its petition, Bell Atlantic requests immediate elimination of virtually all regulations governing its participation in the advanced telecommunications market. While the Telecommunications Act of 1996 significantly increased the Commission's regulatory flexibility, it did not provide the agency with unfettered authority to immediately eliminate all regulations applicable to Bell Atlantic's provision of advanced telecommunications services.

A. Section 706 of the Telecommunications Act is Not an Independent Grant of Forbearance Authority

Bell Atlantic first asserts that Section 706 of the Telecommunications Act of 1996 grants the Commission authority to forbear from applying the "pricing, bundling, and separations requirements" contained in Sections 251 and 271 of the Communications Act in order to promote the deployment of advanced telecommunications services.[3] This assertion is plainly incorrect.

Prior to the enactment of the Telecommunications Act, the Commission had no authority to forbear from applying the provisions of Title II to common carriers.[4] Section 10(a) of the Communications Act, which was adopted as part of the Telecommunications Act, gives the Commission such authority -- provided certain public interest considerations are

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[3] Petition at 4-11.

[4] See MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994).

satisfied.[5] The Act goes on to provide, in Section 10(d), that the Commission may not use this authority to forbear from applying the requirements of Section 251(c) or 271 until the agency determines that "those requirements have been fully implemented."[6]

Bell Atlantic attempts to make an end-run around the Section 10(d) restriction by relying on Section 706 of the Telecommunications Act, which is codified as a note to Section 7 of the Communications Act.[7] Section 706 directs the Commission to initiate regular inquiries "concerning the availability of advanced telecommunications capability to all Americans."[8] If the Commission determines that such deployment has not taken place, Section 706 obligates the agency to use its authority -- provided elsewhere in the Act -- to achieve the statutory objective.[9] These statutory tools include "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[10]

Bell Atlantic argues that Section 706 empowers "the Commission to use any regulat[ory] methods" that it deems necessary to facilitate deployment of advanced telecommunications services.[11] On this basis, Bell Atlantic contends that Section 706 authorizes

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5 See 47 U.S.C. § 160(a).

6 Id. at § 160(d).

7 See id. at § 157 (note).

8 Id.; see H.R. Conf. Rep. No. 104-458, 104th Cong., 1st Sess. 210 (1996).

9 Id.

10 47 U.S.C. § 157 (note).

11 Petition at 6 (emphasis added).

the Commission to forbear from applying the requirements of Sections 251(c) and 271, notwithstanding the restriction contained in Section 10(d).[12] This position cannot be sustained.

Section 706 is not an independent grant of authority; it merely directs the Commission to use statutory powers granted elsewhere in the Act to promote the deployment of advanced telecommunications services.[13] For example, the language in Section 706 stating that the Commission is to encourage deployment of advanced telecommunication services by "utiliz[ing]...measures that promote competition in the local telecommunications market" directs the Commission to use its authority provided elsewhere in the Act.[14] It does not provide

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12 47 U.S.C. § 160(d). Bell Atlantic notes that, by its terms, the restriction contained in Section 10(d) applies to the exercise of the Commission's forbearance authority "under subsection (a) of this Section." Petition at 10. Bell Atlantic asserts that these words demonstrate that Congress vested the Commission with additional forbearance authority under Section 706, and that Section 10(d) does not preclude the Commission from using that forbearance power to excuse the carrier from complying with the requirements of Sections 251 and 271.

The words of Section 10(d) cannot bear the weight that Bell Atlantic has placed on them. These words simply clarify that the Commission cannot find that a carrier has satisfied the public interest conditions specified in Section 10(a) until it has implemented Sections 251(c) and 271. This interpretation is consistent with the Conference Report, which states unambiguously that "the Commission may not forbear from applying the requirements of new Sections 251(c) and 271 until the Commission determines that those requirements have been fully implemented." See H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess, 185 (1996).

13 The courts have made clear that, as a general rule, Title I of the Communications Act is not an independent grant of substantive authority. See Iowa Utilities Board v. FCC, 120 F.3d 753, 795 (8th Cir. 1997) ("Title I of the Communications Act ... confers only ancillary authority"); California v. FCC, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I is not an independent source of regulatory authority").

14 47 U.S.C.§ 251(d) (directing the Commission to adopt regulations to promote local competition); 47 U.S.C. § 252(d) (authorizing the Commission to preempt state or local laws that would prohibit an entity from providing interstate or intrastate telecommunications service).

independent authority to promote local competition. Were it otherwise, the Commission could use Section 706 to require Bell Atlantic to provide competing providers of high-speed local data transport networks with unbundled network elements at TELRIC prices. We doubt very much that Bell Atlantic would accept this interpretation.

In light of the above, it is clear that the Commission lacks the authority to forbear from applying the requirements of Section 251(c) and Section 271. This fact, standing alone, requires the Commission to dismiss Bell Atlantic's petition.

B. Section 3 of the Communications Act Does Not Empower the Commission to Eliminate the Inter-LATA Restrictions

Bell Atlantic next claims that Section 3(25)(B) of the Communications Act empowers the Commission to eliminate the statutory prohibition on the provision of inter-LATA service by the BOCs.[15] This, too, is without merit. Section 3(25)(B) sets forth the definition of a local access and transport area ("LATA"). This provision states, in pertinent part, that: "[t]he term . . 'LATA' means a contiguous geographic area . . established or modified by a Bell operating company after [the] . . . date of enactment [of the Telecommunications Act of 1996] and approved by the Commission."[16]

At most, Section 3(25)(B) empowers the Commission to make limited modifications to the LATA lines adopted in the Modification of Final Judgment. The Supreme Court has made clear, however, that the Commission's authority to "modify" a statutory requirement may not be used to "eliminate" the requirement. As the Court has observed,

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15 See Petition at 11.

16 47 U.S.C. § 3(25)(B).

"[v]irtually every dictionary . . . says that 'to modify' means to change moderately or in a minor fashion."[17] The relief requested by Bell Atlantic -- immediate elimination of all LATA boundaries as applied to the provision of high-speed wireline telecommunications services -- would plainly entail much far than a "moderate" or "minor" change.

Bell Atlantic further contends that the waivers of the inter-LATA restrictions granted by the Decree Court provide ample precedent for its requested "modification." None of the orders cited by the carrier, however, authorized a BOC to provide basic wireline telecommunications service on an inter-LATA basis. Rather, the orders gave the BOCs limited authority to allow them to provide paging, cellular, cable, and video programming services in particular geographic areas. To reduce the risk of anticompetitive conduct, the Decree Court attached significant competitive safeguards to these waivers. For example, the waivers for wireless services require the BOCs to: lease, rather than own, the interexchange transmission facilities;[18] use separate subsidiaries;[19] and provide non-discriminatory interconnection to

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17 MCI v. American Tel. & Tel., 512 U.S. at 225 (FCC cannot use authority to "modify" tariff filing requirements to eliminate the requirement).

18 See, e.g., U.S. v. Western Electric, No. 82-0192, 1993 U.S. Dist. LEXIS 20684, at 3, 4 (D.D.C. Feb. 18, 1993) ("The interexchange links for the multiLATA cellular services authorized by this Order shall be leased from nonaffiliated interexchange carriers"); U.S. v. Western Electric, 1987-1 Trade Cas. (CCH) ¶ 67,452, at 59893 (D.D.C. 1987) ("[T]o ensure that NYNEX does not engage in anticompetitive behavior vis-a-vis interexchange carriers, the order issued herewith contains a condition requiring the New York Partnership to lease interexchange facilities for transportation of the interexchange communications."); U.S. v. Western Electric, 1986-1 Trade Cas. (CCH) ¶ 66, 987, at 62060 (D.D.C. 1986) (Pacific Telesis required to dispose of interexchange microwave transmission facilities obtained through an acquisition).

19 See, e.g., U.S. v. Western Electric, 1986-1 Trade Cas. (CCH) ¶ 67,148 (D.D.C. 1986); U.S. v. Western Electric, 1986-1 Trade Cas. (CCH) ¶ 66, 987, at 62060 (D.D.C. 1986).

competitors.[20] In the case of cable services, the Decree Court required the BOCs to establish separate subsidiaries, and expressly prohibited the carriers from using the facilities to provide inter-LATA telecommunications services.[21] These carefully circumscribed waivers provide no precedent for the wholesale deregulation that Bell Atlantic requests.

C. Section 2(b)(1) of the Communications Act Limits the Commission's Jurisdiction to Deregulate Local Transport Services

Finally, Bell Atlantic asserts that because its application concerns the carrier's authority to provide "interstate services" there is "no question as to the Commission's jurisdiction" to eliminate all price and other regulation of Bell Atlantic's proposed service.[22] This statement is plainly inaccurate. Bell Atlantic appears to assume that all of its high-speed facilities and services will be used to provide Internet and other information services, and that all such services are jurisdictionally interstate. Neither of these assumptions is correct. To the extent that Bell Atlantic seeks the deregulation of purely intrastate and jurisdictionally mixed services, its petition raises difficult questions regarding the scope of the Commission's authority.

As part of its request for "relief," Bell Atlantic seeks the complete deregulation of high-speed transport services that are provided over physically local facilities. The carrier fails to acknowledge, however, that these facilities can be used for a variety of purposes. For

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20 See U.S. v. Western Electric, No. 82-0192, 1993 U.S. Dist. LEXIS 20684, at 3, 4 (Feb. 18, 1993) ("[T]he terms and conditions (including price) on which the BOCs' operating companies provide exchange access and interconnection to affiliated cellular systems shall be no more favorable than those offered to competing cellular systems.").

21 See, e.g., U.S. v. Western Electric, No. 82-0192, 1993 U.S. Dist. LEXIS 20660 (D.D.C. Sep. 21, 1993); U.S. v. Western Electric, No. 82-0192, 1994 U.S. Dist. LEXIS 19190 (D.D.C. Sep. 20, 1994).

22 See Petition at 5 n.3 (emphasis added).

example, in some cases, Bell Atlantic's facilities will be used to create high-speed intrastate private networks. Pursuant to Section 2(b)(1) of the Communications Act, the rates that Bell Atlantic can charge to provide this purely intra-state service are subject to State regulation.[23]

In other cases, Bell Atlantic's local facilities will be used to transport data between subscribers and information services providers ("ISPs"). Such usage, however, does not necessarily render the carrier's services interstate.[24] Indeed, as Bell Atlantic recognizes, "neither the consumer nor the phone company" has any means of knowing the "geographic destination" of information service traffic carried over a carrier's local facilities.[25] This is because, during the course of a single on-line session, an ISP's subscriber may interact with computer servers in multiple locations. Some of these sites may be located in the subscriber's state, while others may be located in another state or even another country. For this reason, the Commission has long held that ISPs may purchase local transmission service out of Federal interstate tariffs or out of the same State tariffs available to other business users.[26]

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23 See 47 U.S.C. § 152(b).

24 See California v. FCC, 905 F.2d 1217, 1244 (9th Cir. 1990) (recognizing that information services are jurisdictionally mixed); see also Brief for the Federal Communications Commission at 79, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) (No. 96-3321) ("[T]he telephone facilities the ISPs use are 'jurisdictionally mixed,' in that they carry both interstate and intrastate traffic.").

25 Petition at 3.

26 See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 nn. 8 & 53 (1988); Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges, FCC 97-158, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, at ¶ 344 (rel. May 16, 1997), on appeal sub nom. Southwestern Bell Tel. Co. v. FCC, No. 97-2618 (8th Cir.).

To the extent that a portion of the traffic that will be carried over Bell Atlantic's local facilities is jurisdictionally intrastate, Section 2(b) of the Communications Act plainly restricts the ability of the Commission to fully deregulate the carrier's offering because doing so would require the agency to preempt valid State regulations.[27] This is not to say that the Commission cannot do so. However, the Commission would be required to justify preemption of state regulation under the "impossibility exception" carved out of Section 2(b) of the Communications Act by Louisiana PSC and its progeny.

II. BELL ATLANTIC'S PROPOSAL IS INCONSISTENT WITH THE PRO-COMPETITIVE POLICIES EMBODIED IN THE TELECOMMUNICATIONS ACT

The Commission also must reject Bell Atlantic's approach because it is unsound as a matter of policy. The carrier argues, in effect, that regulation is the problem -- and that the elimination of regulation is all that is necessary to facilitate deployment of advanced telecommunications infrastructure and services. This approach is fundamentally inconsistent with the pro-competitive approach adopted by Congress in the Telecommunications Act.

Congress has clearly recognized that, while elimination of unnecessary regulation is essential, the primary problem facing the telecommunications market is the lack of local competition. Consistent with this recognition, Congress adopted a four-pronged strategy to reform the telecommunications market.

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[27] See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986); Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997); See also National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989) (FCC cannot require the States to deregulate services simply because they have been deregulated at the federal level).

- First, the Telecommunications Act eliminated government-imposed barriers to entry.[28]

- Second, the Act imposes obligations on incumbent local exchange carriers to assist new entrants that seek to enter the market.[29] This includes the obligation to provide potential competitors with access to unbundled network elements necessary to offer local telecommunications service.

- Third, the Act provides that, during the transition to competitive markets, dominant carriers will remain subject to regulation. In particular, Congress provided that, until a BOC complies with the statutory Competitive Checklist designed to open up the local market, it may not provide services on an inter-LATA basis.[30] Congress also decided that, even after the BOCs are allowed into the inter-LATA market, they must comply with structural separation and non-discrimination requirements for a prolonged period.[31]

- And, finally, the Act provides that -- as competition takes root -- the Commission is to eliminate regulations that are no longer necessary to protect consumers.[32]

Bell Atlantic asks the Commission to disregard this carefully balanced approach and, instead, to simply leave the carrier free to act as it chooses. The Commission should decline the invitation. Grant of Bell Atlantic's request for immediate entry into a significant portion of the inter-LATA market would substantially reduce the carrier's incentive to open the local market to new entrants. At the same time, elimination of pricing and separation requirements would farther enhance its ability to act anti-competitively. Granting Bell Atlantic's petition is not likely to facilitate the deployment of advanced telecommunications services. Bell Atlantic's

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28 See 47 U.S.C. § 252(d) (preempting state-imposed barriers to entry).

29 See id. at §§ 251(c) & 271.

30 See id. at § 271(a).

31 See id. at § 272.

32 See id. at § 160.

pleading largely ignores the local market and, instead, focuses on the supposed need to allow it to deploy additional Internet backbone capacity. The carrier insists that there is a shortage of backbone capacity, which accounts for the slow-speeds sometimes encountered by Internet users. This is demonstrably incorrect. While congestion is sometimes a problem on the Internet, this does not necessarily mean that capacity is in short supply. Today, numerous companies provide Internet backbone capacity, typically using high-capacity private lines that can transport data at speeds of up to 45 million bits per second. Congestion can result from numerous causes -- ranging from deployment of an inadequate number of modems by some ISPS to sub-optimal configuration of hubs and routers. Consequently, the addition of one more backbone provider is unlikely to solve the congestion problem.

The real problem for information services subscribers is in the local market, which is dominated by monopoly carriers that provide most users with no practical alternative other than to access the Internet using POTS lines. These facilities, which are designed for voice traffic, can carry data at speeds of no more than 56 thousand bits per second.[33] There is a critical need for the deployment of high-speed local transport services -- such as xDSL, frame relay, and ATM -- that can meet the needs transport data between subscribers and their Internet service providers. Unfortunately, Bell Atlantic's history of deploying advanced telecommunication services in the local markets in which it has long operated is not an impressive one. The carrier was slow to make ISDN available, and has threatened not to deploy any advanced local

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[33] See "Digital Tornado: The Internet and Telecommunications Policy" at 73-78 (OPP Working Paper Mar. 1997).

telecommunications services unless information service providers are required to use them, rather than existing offerings.[34]

Experience demonstrates that the only means to ensure the deployment of advanced telecommunications services is for the Commission to adopt policies that will promote competitive provision of these offerings. The Commission is currently considering precisely this issue in the Internet Inquiry.[35] Until the Commission has developed and implemented a feasible plan to facilitate the competitive deployment of advanced telecommunications facilities and services, consideration of wide-spread deregulatory proposals is premature.

That said, ITAA emphasizes that it does not favor regulation for regulation's sake. To the contrary, the experience of the information technology industry demonstrates that the public interest is best served by non-regulated, competitive markets. As local competition takes root, therefore, ITAA firmly believes that -- as it has done in other market sectors -- the Commission should remove regulations that are no longer necessary.

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[34] See, e.g., Comments of Bell Atlantic/NYNEX, CC Docket No. 96-262, at 63-64 (filed Jan. 27, 1997).

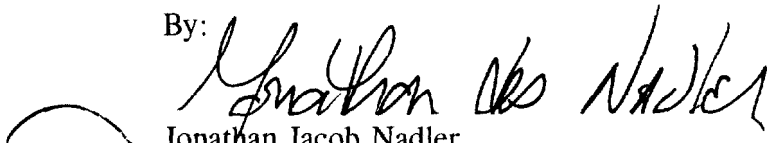
[35] See Usage of the Public Switched Network by Information Service Providers and Internet Access Providers, CC Docket No. 96-263.

CONCLUSION

For the foregoing reasons, the Commission should deny Bell Atlantic's petition. At the same time, the agency should move forward in its consideration of the policies necessary facilitate the deployment of competitive broadband telecommunications facilities and services.

Respectfully submitted.

INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

By: 

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